Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petitions of SBC ILECs and	)	
VarTec Telecom, Inc. For	)	WC Docket No. 05-276
Declaratory Ruling Regarding	)	
The Application Of Access Charges	)	
To IP-Transported Calls	)	
	)	
Petition of Grande Communications, Inc.	)	
For Declaratory Ruling Regarding Inter-	)	WC Docket No. 05-283
Carrier Compensation for IP-Originated	)	
Calls	)	
	)	

REPLY COMMENTS IN WC DOCKET NO. 05-276
INITIAL COMMENTS IN DOCKET NO. 05-283
OF
BROADWING COMMUNICATIONS, LLC
AND
LEVEL 3 COMMUNICATIONS, INC.

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Dated: December 12, 2005

TABLE OF CONTENTS

SUMMARY

Some commenters have offered certain common law tort theories to support their arguments that intermediate carriers are liable for access charges to terminating LECs. Two of these theories are based on principles of agency and joint and several liability. As a general matter, these tort theories are inapplicable and the Commission should not entertain them. Even if it was appropriate to apply tort law, neither of these theories withstands scrutiny. There is no principal-agent relationship between carriers who cooperate in transporting telecommunications traffic because the key elements of this relationship are not present. Neither party has the right to control the conduct of the other, affect the legal relations of the other or to act as a fiduciary. Likewise, the elements necessary to establish joint and several liability are absent, since such liability is predicated upon an indivisible harm by parties acting in concert. Even in the rare circumstances in which multiple carriers have worked together to avoid access charges, it is easy to apportion the harm for access charge evasion, since this act is directly attributable to the last non-LEC carrier that delivers the traffic to the local exchange carrier(s).

Some commenters have also suggested that some intermediate carriers are liable for access charges because they have "constructively ordered" those services. This theory is also unavailing, because in the typical case it cannot be established that the intermediate carrier expects to receive access services, is in a position to refuse them or in fact receive access services at all.

In other comments, Verizon attempts to expand the scope of this proceeding and establish a toe-hold for its position that the net protocol conversion inherent in IP-to-PSTN interconnection may not be eligible for the ESP exemption from access charges. Verizon claims that this type of protocol conversion falls under the "new technology" exception. Verizon's

argument, however, is based on a weak analogy and demonstrates either a misunderstanding of the nature of these protocol conversions or the technical underpinnings of the exception. As the Commission has determined on a number of occasions, IP-to-PSTN protocol conversions are "enhanced services" that are exempt from access charges. The Commission should not be drawn into this discussion because it is not appropriately raised in this proceeding and is being addressed in other more comprehensive dockets.

This filing also comprises the Initial Comments of Level 3 and Broadwing in WC Docket No. 05-283. Level 3 and Broadwing agree with Grande Communications that a LEC (or any intermediate carrier) should be able to rely on self-certification from its customer that the traffic originating from that customer is enhanced services, VoIP or other IP-enabled traffic that undergoes a net protocol conversion. To do otherwise would be unduly burdensome and would hinder technological innovation and market competition.

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In the Matter of	)	
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Petitions of SBC ILECs and VarTec Telecom, Inc. For Declaratory Ruling Regarding The Application Of Access Charges To IP-Transported Calls	)	WC Docket No. 05-276
	)	
Petition of Grande Communications, Inc. For Declaratory Ruling Regarding Inter-Carrier Compensation for IP-Originated Calls	)	WC Docket No. 05-283

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OF
BROADWING COMMUNICATIONS, LLC
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Broadwing Communications, LLC ("Broadwing") and Level 3 Communications, Inc. ("Level 3"), by undersigned counsel and in response to the Commission's Public Notice released September 26, 2005,[1] offer their Reply Comments on the Petitions for Declaratory Ruling filed by the SBC ILECs and VarTec Telecom, Inc.

In addition, in response to the Commission's Public Notice dated October 12, 2005,[2] Broadwing and Level 3 offer their Initial Comments on the Petition for Declaratory Ruling filed by Grande Communications, Inc. ("Grande Petition").

[1] *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276**,** Public Notice (Sept. 26, 2005).
[2] *Pleading Cycle Established for Grande Communication, Inc.'s Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls.*, WC Docket No. 05-283, Public Notice (Oct. 12, 2005).

I. LECS AND INTERMEDIATE CARRIERS SHOULD NOT BE GUARANTORS REGARDING THE NATURE OF RECEIVED TRAFFIC.

Level 3 and Broadwing agree with Grande that a LEC (or any intermediate carrier) should be able to rely on self-certification from its customer that the traffic originating from that customer is enhanced services, VoIP or other IP-enabled traffic that undergoes a net protocol conversion. Based on that assurance, it should then be able to transmit that traffic to subsequent carriers accordingly.[3] As Level 3 maintained in its Comments in this proceeding[4] and expands upon in these Reply Comments,[5] it is highly impractical, unreasonable, and against public policy to expect a carrier to police its many customers and act as a guarantor regarding the nature of any customer's traffic. Besides being unduly burdensome, it shifts the burden of proof from terminating LECs, which by common law have the duty to establish that they have been affirmatively harmed,[6] to intermediate carriers which will then have the duty to "prove a negative" and endlessly establish that they are *not* causing harm. Besides being contrary to basic principles of the law, this is grossly unfair to the intermediate carriers, who must now establish that no carrier in the chain perpetrated a fraud and/or caused a terminating LEC harm. This is poor public policy because the ongoing potential liability will create an overhanging threat to IP-enabled carriers which will have a depressive affect on the business of IP-enabled carriers and be a long-term obstacle to technological innovation and competitive provision of broadband services.

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[3] Grande Petition at 25.

[4] *SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276, Comments of Level 3 Communications, Inc. at 13 (Nov. 10, 2005), attached hereto as Exhibit 1. Level 3 and Broadwing ask that these Comments now be incorporated into the record of the Grande proceeding, WC Docket No. 05-283.

[5] *Infra* p. 5.

[6] Restatement (Second) of Torts § 433 B.

II. COMMON LAW PRINCIPLES OF JOINT LIABILITY DO NOT APPLY

Several commenters have raised theories of liability (e.g. agency, joint and several liability) that are grounded in tort law, not contract law. These theories are out of place in discussions of business relationships that are based solely on contracts or regulations (i.e. Part 69), and the Commission should not entertain these new concepts as part of a proceeding devoted to interpretations of existing access charge rules. As explained further in this section, even if tort theories were appropriate for Commission consideration, the required factual elements are not present to support those theories. Moreover, the weakness of these tort theories cannot be remedied through tariff revisions, because they would conflict with existing rules and require such a divergence from the common understanding of these torts as to comprise an unjust and unreasonable practice.

A. Connecting Carriers Are Not Jointly and Severally Liable for Access Charges.

A number of commenters assert that the various carriers involved in interexchange transmission are jointly and severally liable for any access charges, and that if those charges are avoided, an "indivisible harm" has been perpetrated, for which all are liable. For example, SBC asserts that an IP-based transmission provider and the carrier that delivers the call to the IP-based provider (e.g., VarTec) are both liable for the applicable access charges.[7] SBC cites the Second Restatement of Torts as authority for the statement that "each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."[8] Qwest is in general agreement, contending that the originating IXC, any intermediate IXCs, the last party delivering the call to the local exchange access provider(s) (hereinafter referred to by Level 3 and Broadwing as the "delivering

[7] SBC Comments at 16.
[8] *Id*.

carrier") and any other carrier "involved" in the unlawful scheme to improperly divert access traffic into the local network are jointly and severally liable for access charges.[9] USTA advances the colorful argument that telecommunications common carriage is analogous to the passing of commercial paper, complete with "holders in due course" who may travel back through the chain of holders to obtain satisfaction.[10]

However, a review of the law establishes that joint and several liability is inapplicable. The common law of torts holds that the two important elements of joint and several liability are 1) a *single and indivisible* harm to the injured party, 2) resulting from an act *in concert* with others.[11] In all cases at issue in this proceeding, the first element is never met and the second one rarely.

Without sharing its underlying analysis, SBC labels the harm of avoided access charges as *prima facie* indivisible,[12] but this assumption does not withstand scrutiny. While there are many types of harm that are considered indivisible, such a determination is made only after an injury has been found "incapable of any logical, reasonable or practical division"[13] by the prescribed methods.[14]

Fortunately, in the case of unpaid access charges it is, in fact, a trivial matter to assign liability to a single entity, since the harm occurs at a distinct place and time. The terminating

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[9] Qwest Comments at 16. Verizon goes so far as to extend liability beyond the delivering carrier onto the local exchange itself, stating that when an IXC contracts with a CLEC to hand off the traffic to an ILEC for delivery both the IXC and the CLEC are jointly and severally liable to the ILEC for access charges. Verizon Comments at 8. However, no party really develops its case for CLEC liability, and, as Level 3 showed in its Initial Comments, the CLEC is a joint provider of access services that should not be held liable for any access charges that may be due from the delivering carrier.
[10] USTA Comments at 8.
[11] Restatement (Second) of Torts §§ 875, 876.
[12] SBC Comments at 16.
[13] Restatement (Second) of Torts § 433A cmt. i.
[14] *Id.* § 433A(2).

LEC (or LECs) merely need to look at the other end of the interconnection trunks to determine the identity of the party that delivered *all* of the offending traffic. This is the contractual customer, and this is the party which is obligated to designate the proper jurisdiction of the delivered traffic. Moreover, the source of the harm occurs at a severable (albeit miniscule) point in time, which the Restatement cites as another example of divisibility.[15]

SBC has cited *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co*.[16] as supporting its concept of joint and several liability.[17] Ironically, that case is more supportive of Level 3's and Broadwing's position in this matter. While *Louisville* did apply joint and severable liability to carriers who *expressly agree* to tariff excessive joint rates to end users, it also affirmed that this "does not make connecting carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. *Each connecting carrier is liable only for its own act.*"[18] This applies to the majority of situations at issue in this proceeding, where an originating and/or intermediate carrier has arranged for local access with the last party delivering the call ("delivering carrier") to the local exchange access provider(s). It is no more reasonable to expect an originating or intermediary carrier to accept liability for a delivering carrier's acts, such as mislabeling traffic, than it would be to expect Amazon.com to accept liability when UPS damages the recipient's loading dock. The harmful act is attributable to the delivering carrier, which is liable for its own act, and it is this carrier only from which a remedy can be obtained.

Even if the Commission were to find that the avoided access charges are an indivisible harm, the aggrieved LECs would still need to establish the second element, that the carriers were

[15] *Id.* § 433A cmt. c.
[16] 269 U.S. 217 (1925)("*Louisville*").
[17] SBC Comments at 16.
[18] 269 U.S. at 232 (citations omitted)(emphasis supplied).

acting in concert to avoid these charges. It is not enough to simply impute cooperative action to all carriers in the chain of transmission. Mere business dealings do not comprise a concerted effort. Rather, parties are not acting in concert unless "they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result."[19] While it is possible that two or more carriers might concoct a plan with the "particular result" of avoiding access charges, it is even more likely that a carrier would simply solicit bids for termination of long distance traffic for the "particular result" of achieving the lowest practicable cost. In the latter situation, the intermediate carrier is not specifically intending to avoid access charges, or harm the LEC in any other way, and it would be contrary to established law to impose liability on that carrier for the unlawful conduct of the delivering carrier. For that reason, the Commission must not create a blanket presumption of joint and several liability among carriers.

B. A Principal-Agent Relationship Does Not Exist Between Connecting Carriers.

In its comments, Frontier attempts to parlay a simple connecting carrier arrangement into a principal-agent relationship.[20] Frontier misunderstands the nature of this special relationship. The accepted definition of the principal-agent relationship is "the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf and submit to his control, and consent by the other so to act."[21] Some of the important features of this relationship are:

- The agent acts on the principal's account and the principal has the right to control the conduct of the agent with regard to the matters entrusted to him;[22]
- The agent has the power to alter legal relations between the principal and third persons, creating rights and liabilities;[23]

[19] Restatement (Second) of Torts § 876 cmt. a.
[20] Frontier Comments at 5.
[21] Restatement (Second) of Agency § 1.
[22] *Id.* § 1 cmt. e, § 14.

- The agent is a fiduciary with respect to matters within the scope of his agency.[24]

None of these features exist in the standard connecting carrier arrangement. In reality, almost all interconnection agreements have language that specifically disclaims any agency relationship between the interconnecting carriers. Except in the rare case of affiliate transactions, an originating or intermediary carrier has absolutely no say in the manner in which a delivering carrier fulfills its common carrier duty, so long as the traffic is delivered in accordance with the agreement between the parties. Moreover, the delivering carrier has no power to affect the legal relations between the originating or intermediary carrier and any other parties. It does not negotiate on behalf of any other carrier, it does not establish accounts on behalf of any other carrier, it makes no payment arrangements on behalf of any other carrier, and it makes no representations on behalf of any other carrier. It merely delivers traffic to a terminating LEC in accordance with a two-party agreement or tariff between the LEC and itself. Finally, the connecting carrier is by no means a "fiduciary," as in "a person in the character of a trustee . . . in respect to the trust and confidence involved in it and the scrupulous good faith it requires."[25] Instead, the connecting carrier is a service supplier in an arms-length transaction, operating solely in its own best interests.

The law is clear that this type of relationship is *not* a principal-agent relationship. "A person who contracts to accomplish something for another or *to deliver* something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor."[26] That is precisely the nature of most of the connecting carrier relationships at issue in this proceeding. The parties

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[23] *Id.* § 12, cmt. a.
[24] *Id.* § 13
[25] Blacks Law Dictionary 625 (6th ed. 1990).
[26] Restatement (Second) of Agency § 14 L (emphasis supplied).

are independent contractors conducting business with each other in accordance with well established common carrier principles. No principal-agent relationship exists and, consequently, there is no basis for shared liability among connecting carriers.

III. IP-ENABLED SERVICES DO NOT FALL WITHIN THE "NEW TECHNOLOGY" EXCEPTION TO THE ESP EXEMPTION.

In its comments, Verizon asserts that the PSTN-to-PSTN services at issue in this proceeding do not involve a net protocol conversion, but even if they did, such services would be subject to access charges. Verizon implies that an IP conversion is merely a "piecemeal" conversion necessitated by the introduction of new technology in order to maintain compatibility with the existing network.[27] Verizon offers little support for its assertion, arguing only that the exception applies because IP-in-the-middle traffic is "directly analogous" to end office analog to digital conversion that permits an analog terminal to connect to a digital switch, and that IP conversion is merely required to enable IP terminals to communicate with traditional PSTN devices.[28]

As an initial matter, it is curious that Verizon has broached this topic at all, since it is clear that the SBC-VarTec Petitions are focused on PSTN-to-PSTN "IP-in-the-middle" services. Net protocol conversion is not one of the issues raised by this proceeding, and is in fact being addressed more appropriately in other open proceedings.[29] Ordinarily, Level 3 and Broadwing would simply ignore this attempt to raise new issues without proper notice, but the implications of Verizon's interpretation are so alarming that Level 3 and Broadwing are compelled to address them here. Verizon's assertion is incorrect for at least four reasons.

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[27] Verizon Comments at 5.
[28] *Id.*
[29] *See* Level 3 Comments at 5.

A. IP-Enabled Services Do Not Fall Within the Recognized Scope of the Exception.

The Commission has recognized that the "new basic network technology" exception carves out only those services "which require[] protocol conversion to maintain compatibility with existing CPE [customer premises equipment]."[30] The Commission has ruled that this type of compatibility requirement "arises when innovative basic network technology is introduced into the network in a piecemeal fashion, and conversion equipment is used in the network to maintain compatibility with CPE."[31] Thus, the exception is designed to cover "carrier-provided end office" conversions that permit outdated equipment (such as analog CPE) to interact with modernized infrastructure (such as an all-digital network).[32]

Level 3 and Broadwing emphasize that net protocol conversions related to IP-enabled services do not fall within this scope, and, indeed, Verizon's argument turns this exception on its head. The limited purpose of the "new basic technology" exception was to allow the Bell System (pre-divestiture) and the Bell Operating Companies (post-divestiture) to introduce new network technologies, such as digital end offices, into their network and convert signals into analog format when necessary to allow their customers to use existing analog CPE.[33] Without this exception, the Bell System (and the BOCs) could never have modernized its own network

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[30] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956 para. 106 (1996)("*Non-Accounting Safeguards Order*").

[31] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 para. 15 (1995).

[32] *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072 para. 70 (1987)("*Computer III Phase II Order*").

[33] *See id*.

without changing all attached CPE in order to avoid any protocol conversions. Otherwise, the protocol conversions would have been considered "information services," and the Bell System would have forced to provide such services through a separate subsidiary under *Computer II* or subject to the *Computer III* non-structural safeguards.

Thus, in adopting the "new basic technology" exception, the Commission sought to ensure that it did "not create disincentives for introduction of new technology."[34] To ensure that the exception did not swallow the underlying rule (*i.e.*, services that perform protocol conversions are enhanced services), however, the Commission limited the exception to "circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology."[35]

As an example, IP-to-PSTN services, as offered by Level 3, Broadwing and other IP-enabled service providers, engage in protocol conversions not to ensure compatibility between the network provider and their customers' aging CPE, but rather to allow compatibility among multiple networks. More fundamentally, IP technology enables advanced, enhanced features that are not possible with ordinary circuit switching, which further necessitates the protocol conversion.

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[34] *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 FCC2d 584, 591-92 para. 17 (1983)("*Protocols Order*"); *see also id*. para. 3 (considering "whether carriers subject to *structural* separation of basic and enhanced offerings and related facilities should be permitted to associate code and protocol conversion capabilities with facilities used to support the offering of basic service"); *Computer III Phase II Order* para. 65 (explaining that the Commission "designed this exemption to codify [its] original finding . . . that [it] would favor waiver applications seeking to remove such conversions from the enhanced service category.").

[35] *Protocols Order* para. 17; *see also Integrated Services Digital Networks (ISDN)*, 98 FCC2d 249 para. 40 (1984) ("[I]n circumstances involving no change in an existing service, but merely a change in electrical interface characteristics to facilitate the transitional *introduction* of new technology, we resolved to act favorably and expeditiously on petitions for waiver of the Computer II requirements to ensure than new technology to implement an existing service can and will be employed.").

These and other IP-enabled services do not fall into the narrow set of circumstances that the Commission included in the exception. Contrary to the limited purpose behind the exception, IP-enabled services *do* involve a change away from the existing circuit-switched service, and they offer far more than "merely a change in electrical interface characteristics to facilitate transitional introduction of new technology."[36]

B. IP-Enabled Services Do More than Connect Old and New Transmission Technologies.

Verizon's interpretation of the exception appears so broad that it ignores the enhanced functionalities that IP-enabled services provide. IP-enabled service offers its users a wide array of advanced IP-based functionalities that bear no resemblance whatsoever to basic service.[37] Many IP-enabled communications services provide the same slate of "computing capabilities" that led the Commission to conclude that Pulver's Free World Dialup ("FWD") is an information service.[38] For instance, the IP-enabled communications services offered by Level 3, Broadwing and other carriers allow users to store numbers and voicemail messages on the carriers' servers and to make them available to other IP-enabled communications users. In addition, users of Level 3's services must use a username and password to register for the service, to make

[36] *Protocols Order* para. 17 (limiting the exception to "circumstances involving no change in an *existing* service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology.").

[37] *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b),* WC Docket No. 03-266, at 11-20 (filed Dec. 23, 2003) (describing advanced features such as advanced teleworking services, multimedia conferencing, advanced call centers, unified messaging, call management and screening, find-me follow-me service, location scheduling, and simplified relocation).

[38] *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 para. 11 (2004).

outgoing calls,[39] and to access online features. Like FWD, Level 3's services use Session Initiation Protocol ("SIP") to determine the availability of IP-based callers and IP-based call recipients, and they offer network address translation solutions. And, finally, the platforms that support Level 3's and Broadwing's services have the capability to determine whether other IP-enabled end users are online at any particular time.

C. Verizon's Theory Ignores the Statutory Underpinnings of the Exception.

The Commission has explained that the "new basic network technology" exception and the other two protocol conversion exceptions reflect the statutory definition of information services, which expressly excludes a capability "used 'for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'"[40] The use of IP is *not* limited to the management or operation of telecommunications systems or services (by, for instance, sending switching signals that assist in routing a circuit-switched call). To the contrary, IP-enabled services are stand-alone communications services that offer enhanced functionalities that cannot be performed on circuit-switched networks.

D. Verizon's Theory is Overbroad.

Verizon argues that IP conversion falls within the "new technology" exception because "carrier-provided protocol conversions are needed to permit IP terminals and equipment and TDM terminals and equipment to communicate with one another."[41] This interpretation of the "new technology" exception is so broad that it would encompass *every* service that entails a protocol conversion. Indeed, all protocol conversion services enable interaction between devices

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[39] When a user originates an IP communication from a PC, the user inserts the username and password manually. When a *user* originates an IP communication from an analog handset, attached customer premises equipment provides the username and password automatically.
[40] *Non-Accounting Safeguards Order* para. 106 (quoting 47 U.S.C. § 153(20)).
[41] Verizon Comments at 5.

that operate with different protocols. That is what protocol conversion is for; if every device operated on the same protocol, there would be no need for any conversion. Thus, if the exception extends to the IP services at issue in this proceeding, as Verizon contends, then it must also extend to every other protocol conversion, essentially eliminating the Commission's long-recognized rule that protocol conversion services are information services.

IV. THE CONSTRUCTIVE ORDERING DOCTRINE DOES NOT APPLY TO INTERMEDIATE CARRIERS.

In their comments, Qwest and SBC claim that the intermediate carriers are liable for access charges because they have constructively ordered terminating access services from the LEC.[42] This is incorrect, however, because the relationships among the cooperating carries are at odds with the facts that gave rise to the doctrine as it applies to telecommunications.

The doctrine of constructive ordering arose from *United Artists Payphone Corp. v. New York Tel. Co*.[43] In that case, the FCC looked beyond the definition of "ordering" found in the carrier's tariff to determine whether United Artists was AT&T's "customer." If so, United Artists would be required to pay the tariffed rate. In that case, the FCC concluded that if United Artists "failed to take steps to control unauthorized [charges, it] could reasonably be held to have constructively ordered services from [the carrier]."[44] Thus, under the constructive ordering doctrine, a party "orders" a carrier's services when it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services.

For the constructive ordering doctrine to apply to the intermediate carrier, that intermediate carrier (*i.e.*, the carrier one step removed from the LEC) would need to be

[42] Qwest Comments at 18; SBC Comments at 2.
[43] 8 FCC Rcd 5562 (1993)
[44] *Id.* at 5563 (emphasis added).

interconnected to the ILEC in a manner that would cause that carrier to believe it could expect to receive access services from the LEC, and then the intermediate carrier would have to fail to take steps to prevent the receipt of access services, and finally in fact receive access services. However, as explained previously,[45] the intermediate carrier has most likely contracted for general call completion services from the delivering carrier, rather than "access" *per se.* When an intermediate carrier is so indirectly associated with a terminating LEC, it cannot be considered to have requested or received "access services" from the LEC, and thus cannot have constructively ordered those services.

V. CONCLUSION

Common law theories of joint liability are not applicable to disputes regarding access charge evasion. Theories such as joint and several liability, agency, or constructive ordering cannot be shoe-horned into this situation because the required factual elements are absent. The obligations of carriers that interconnect to the local exchange network are grounded in contract or tariff, and LECs should seek remedies accordingly.

Arguments seeking to expand this proceeding to restrict the availability of the ESP exemption are also out of place. This docket is limited to PSTN-to-PSTN services and the Commission should dismiss out of hand Verizon's suggestion that IP-PSTN services should be addressed. The Commission is examining the classification, and treatment, of IP-enabled services in its comprehensive rulemaking docket and that docket is the appropriate forum to resolve IP-PSTN traffic issues.

Finally, Level 3 and Broadwing agree with Grande that a LEC (or any intermediate carrier) should be able to rely on self-certification from its customer that the traffic originating

[45] *Supra* p. 6.

from that customer is enhanced services, VoIP or other IP-enabled traffic that undergoes a net protocol conversion. To do otherwise would be unduly burdensome and would hinder technological innovation and market competition.

Respectfully submitted,

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Dated: December 12, 2005

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Dated: November 10, 2005

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SUMMARY

In its Notice, the Commission requested comment regarding, among other things, SBC's request for a declaratory ruling that wholesale transmission providers that use Internet Protocol ("IP") to carry long distance calls that originate and terminate on the public switched telephone network ("PSTN") are "interexchange carriers" for purposes of Rule 69.5 and thus subject to access charges. Level 3 believes that the FCC has already decided this matter in the *AT&T Declaratory Ruling*. In view of that, SBC is overreaching with its broad-brush petition that advocates an approach that would make SBC the sole arbiter of whether access charges apply to a call. Level 3 is particularly concerned that the relief that SBC seeks will expose any carrier in the chain of transport to access charges, even those intermediate carriers that do not have a direct relationship with the access provider and may indeed not even be aware of the manner in which others have treated the traffic.

The Commission can better address SBC's request for relief by (1) clarifying that there is no situation in which a customer may use local exchange business services for the delivery of IP-in-the-middle long distance traffic to terminating LECs and (2) permitting LECs to amend their access tariffs to include provisions reclassifying fraudulent local exchange business service customers as access customers. At the same time that it provides this protection, however, the Commission should also emphasize that terminating ILECs can *not* look up the chain of cooperating carriers/providers to pick who is responsible for access charges. In particular, neither of the following two parties is liable for access charges: (1) a CLEC who cooperates to jointly provide access services to an IXC; or (2) an intermediate IXC who does not hand traffic directly to a terminating LEC(s).

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COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Level 3 Communications, Inc. ("Level 3"), by undersigned counsel and in response to the Commission's Public Notice released September 26, 2005,[1] offers its comments on the Petitions for Declaratory Ruling filed by the SBC ILECs and VarTec Telecom, Inc.

Level 3 notes that for the purposes of these comments, it uses phrases such as "interexchange" and "interexchange carrier" with the understanding that they reference *only* traditional PSTN-to-PSTN traffic and are used for ease of reference. The use of those terms as they might apply to IP transport should not be read to mean that Level 3 agrees that any exchange boundaries exist on an IP network or when a IP carrier provides transport services. Level 3 believes that the arbitrary boundaries established by local calling areas, exchange boundaries, LATAs, etc. remain one of largest impediments to the widescale overhaul of the regulatory regime for communications.

[1] *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket 05-276**,** Public Notice (Sept. 26, 2005).

I. THE COMMISSION SHOULD SINGLE OUT AND DISCOURAGE SELF-HELP EFFORTS BY LECS

Level 3 agrees that the network switching technology (*e.g.* circuit switched TDM vs. packet switched IP) is not the sole determinant when analyzing the status of the carrier and the jurisdiction of the traffic.[2] However, SBC assumes too much by characterizing the issue as a simple "IP-in-the-middle" dispute. The issue is more complicated than that, and technology-induced confusion regarding the nature of traffic it receives should not grant SBC or any LEC unilateral privileges to classify traffic. Specifically, SBC and other LECs may not unilaterally determine that traffic is long distance PSTN-to-PSTN and start billing access charges. If traffic is sent to a LEC over a non-access service (whether local exchange service or interconnection trunks), the LEC must employ established procedures to confirm that the traffic was improperly routed, and then that it is subject to access charges.

The genesis of SBC's Petition should concern the Commission. SBC's Petition is not an attempt to clarify an unsettled issue, but instead to enforce its legal interpretation through litigation. Rather than engage in the rulemaking process that VarTec initiated, SBC denigrated VarTec's Petition as "meritless,"[3] unilaterally applied the *AT&T Declaratory Ruling*[4] to intermediate carriers (even though the facts were different), and not only launched complaints for breach of contract, but went so far as to also allege fraud and civil conspiracy. After all that, it now finds itself at the Commission, where it should have started in the first place.

Such a heavy-handed practice, tantamount to self-help, is highly disruptive to the industry and a waste of resources. This approach is egregious given that many of SBC's purported

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[2] SBC Petition at 3.
[3] SBC Petition Exhibit F at 14.
[4] *Petition for Declaratory Ruling that AT&T's Phone-to Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. Apr. 21, 2004) ("*AT&T Declaratory Ruling*")

"customers" are not on notice that they may be subject to access charges. Contrary to SBC's claims, there is nothing in SBC's (or any other RBOCs') tariffs that would put an intermediate carrier on notice that it may be liable to SBC for access charges where it has no direct relationship with SBC. If SBC believes there is an applicable provision, it should provide the Commission with the exact tariff section and language.

Each of the RBOC's access tariffs contain provisions stating that the RBOC will "bill on a current basis all charges incurred by and credits due to the customer."[5] Under the terms of these tariffs, the ILEC bills a "customer." The term customer "denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which *subscribes* to the services offered under this tariff, including Interexchange Carriers (ICs) and End Users."[6] This is the full extent to which an access customer is described. The tariffs do not include an intermediate carrier in the definition of a "subscriber."

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[5] *See* Verizon Telephone Companies Tariff FCC No. 16 § 2.4.1(B); Pacific Bell Tariff F.C.C. No. 1 § 2.4.1(B); Qwest Corporation Access Service Tariff F.C.C. No. 1 § 2.4.1(B); BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1 § 2.4.1(B); and Ameritech Operating Companies Tariff F.C.C. No. 2 § 2.4.1(B). Southwestern Bell's tariff does not contain this exact language. In that tariff, the company notes that billing will be conducted based on jurisdictional basis when known, and otherwise, by the percentage of interstate use reports required to be *submitted by customers*. Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 2.4.

[6]This provision is found in the RBOC access service tariffs filed with the FCC at the following locations: Verizon Telephone Companies Tariff FCC No. 16 § 2.6; BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1 § 2.6; Ameritech Operating Companies Tariff F.C.C. No. 2 § 2.6; and Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 2.7. (Emphasis added.)

Pacific Bell adds the term "and collocators" to the end of the definition at Pacific Bell Tariff F.C.C. No. 1 § 2.6. "The term 'Collocator' refers to any individual, partnership, association, joint-stock company, trust corporation, or governmental entity or any other entity who provides fiber-optic facilities or microwave facilities for connection of its equipment, collocated in Telephone Company locations(s), to Telephone Company equipment and services." *Id.*

Qwest adds the term "and interconnectors" to the end of the definition at Qwest Corporation Access Service Tariff F.C.C. No. 1 § 2.6. "The term 'interconnector(s)' denotes any customer(s) who subscribes to Expanded Interconnection-Collocation (EIC) Service and who

The Commission requires that "in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations,"[7] and any ambiguities are to be construed against the carrier.[8] Thus, for SBC to reinterpret unilaterally its tariff provisions to create a basis (where none otherwise exists) for imposing access charges on carriers that do not have a direct relationship with SBC is so unreasonable as to violate Section 201 of the Act.[9] Moreover, even if there arguably was any ambiguity in SBC's tariff, the issue should be escalated to the appropriate regulatory body for a determination. Specifically, if an ILEC contends that an intermediate carrier is an access customer, it should, at a minimum, file revisions to its tariff, where they can be placed on public notice, opposed, suspended (if appropriate) and resolved by informed parties in a public forum.

Better yet, LECs should wait until clearer guidelines are established by the Commission. Not every dispute over traffic jurisdiction is an *NTS* situation,[10] nor did the *AT&T Declaratory*

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provides fiber optic facilities to Company-designated locations for connection to EIC Service." *Id.*

[7] 47 C.F.R. § 61.2.

[8] *The Associated Press Request for Declaratory Ruling*, Memorandum Opinion and Order, 72 F.C.C. 2d 760, 764-65 (1979) (quoting *Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, aff'd 29 FCC 1205 (1960)).

[9] Section 201(b) requires that the "charges, practices, classifications, and regulations" for communications services be just and reasonable. The Commission has determined that where a carrier attempts to enforce an unclear tariff provision against its customer, the tariff violates Section 201(b)'s just and reasonable requirements. *See* Halprin, Temple, Goodman & Sume v. MCI Telecomms. Corp., File No. E-98-40, Memorandum Opinion and Order, 13 FCC Rcd 22568 para. 13 (1998)("[W]e find that the Tariff does not clearly describe when MCI will charge Non-Subscriber rates to a line presubscribed to MCI. Accordingly, we conclude that the Tariff is neither clear nor explicit. On this basis, we find that the Tariff violates part 61.2 of the Commission's rules and section 201(b) of the Act.")

[10] SBC Petition at 10 n. 10. The issues in this proceeding, which turn on a question of legal interpretation, are easily differentiated from cases where a defendant has intentionally misrepresented the nature of its traffic. NTS pleaded guilty to fraud for intentionally routing its calls through equipment that stripped the calling party number information, after which NTS erroneously certified to SBC that intrastate calls were interstate in nature, thus avoiding higher intrastate access charges.

Ruling dispose of all the issues regarding IP-based transport. In its Petition, SBC attempts to anticipate and refute any assertion that the issue of classifying IP-enable services is unsettled.[11] However, contrary to SBC's portrayal of the *AT&T Declaratory Ruling* as all-encompassing, there are many unresolved issues before the Commission. For example, in addition to the issue in this proceeding as to whether wholesale transmission providers using IP technology to carry PSTN-PSTN long distance calls are liable for access charges, the Commission is seeking to determine:

- Whether the Commission should apply access charges to IP-enabled services at all, or impose intercarrier compensation obligations different from those paid by non-IP-enabled telecommunications service providers.[12]
- Whether certain characteristics of IP-enabled services, such as the irrelevance of geography, require different treatment for intercarrier compensation purposes.[13]
- Whether IP-originated traffic can be terminated over local trunks as local traffic.[14]
- The appropriate classification of Internet backbone traffic.[15]

Accordingly, to the extent that LECs like SBC believe that there are ambiguities in the access charge rules, they should use the above forums to advocate that the FCC adopt their interpretations and address their concerns.

[11] SBC Petition at 2.
[12] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 para. 62 (rel. Mar. 10, 2004).
[13] *Intercarrier Compensation Further NPRM; Developing a Unified Intercarrier*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33 para. 80 (rel. March 3, 2005).
[14] *Petition for Declaratory Ruling of Grande Communications, Inc. Regarding Self-certification of IP-Originated VoIP Traffic*, WC 05-283 at 25 (filed Oct. 3, 2005).
[15] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 para. 15 (1998).

II. SBC HAS OVER-SIMPLIFIED THE ACCESS CHARGE PROBLEM AND OVERSTATED THE REMEDY, AT THE RISK OF VIOLATING EXISTING RULES AND UNDERMINING THE ESP EXEMPTION

A. Traditional Access Service

A traditional circuit-switched access service is arranged as depicted in this diagram:

End User → LEC → PICC'd Circuit-switched IXC → LEC → End User

This straightforward arrangement corresponds to SBC's Illustration 1. A single IXC carries a circuit switched call from the originating LEC to the terminating LEC and pays access charges to the respective LECs in accordance with Part 69 of the Commission's rules and the applicable LEC access tariffs. In this instance the originating caller has selected the carrier providing its interexchange service.

B. IP-In-The-Middle Access Service

Over the last few years, many IXCs have incorporated IP packet switching into their networks, in which PSTN voice traffic is routed through gateways which encode the voice signal into IP packets and route the traffic to its destination, where it is decoded and delivered to the local PSTN on the terminating end. This so-called "IP-in-the-middle" arrangement is as follows:

End User → LEC → IP Packet Network → LEC → End User
or Internet

Because their IP networks have used data protocols that were traditionally associated with enhanced services, some IXCs have characterized their IP-in-the-middle transport as an enhanced service and have accordingly sought to avoid access charges. However, as SBC has emphasized, the Commission has declared that calls that originate and terminate on the PSTN, but use IP in the middle, are subject to traditional access charges.[16] Consequently, the rules regarding this arrangement are settled.

C. Jointly Provided Access Service

Up to this point, Level 3 is in agreement with SBC. Unfortunately, SBC wants to overextend the application of the *AT&T Declaratory Ruling* so that any and all wholesale carriers of IP traffic are subject to access charges.

First, it is important to clarify which entities SBC proposes to sweep up in its dragnet. Specifically, the Commission should recognize and affirm that LECs that cooperate in providing exchange access to IXCs are not subject to access charges of any type. These arrangements are depicted in the following diagrams:

End User → LEC → Circuit switched IXC → LEC A → LEC B → End User

End User → LEC → IP Packet Network → LEC A → LEC B → End User
or Internet

These arrangements correspond to SBC's Illustration No. 2, although it is somewhat disingenuous that SBC has depicted the cooperating LEC in subscripted format, as if it is not a legitimate party to the exchange. In fact, this arrangement is routine service in which the two LECs cooperate to provide jointly provided switched access, in accordance with the meet-point billing provisions of their interconnection agreement and industry guidelines (*i.e.* MECAB). The parties cooperate to terminate traffic and bill the IXC for their respective elements of the termination service. Typically, the ILEC is in the role of LEC A, providing access tandem

[16] *AT&T Declaratory Ruling* para. 15.

services to LEC B when LEC B does not have the traffic volume to justify its own access tandem, but there is no rule that states that the roles cannot be reversed.

Contrary to what SBC has implied, there can be legitimate reasons for the non-ILEC to be the first point of local switching. For example, the non-ILEC may be a competitive access provider that offers access tandem services in price competition to the ILEC. Or, in the case of an IP-in-the-middle network, the non-ILEC may provide IP-to-PSTN gateway services that are not available from the ILEC, or are not competitively priced.

If LEC A has delivered traffic to LEC B over local trunks, and LEC B believes the traffic may have been mischaracterized, there are already remedies available. The interconnection agreement with the other LEC will invariably contain provisions for jointly provided switched access (*i.e.* "meet point billing") in accordance with MECAB guidelines.[17] In the case where one party is skeptical about the reported jurisdiction of the traffic, there are provisions that permit that party to conduct an audit of the other party to verify those reports, with remedies available if the audit reveals misreported traffic.[18] If the parties still cannot agree, there are dispute resolution provisions that may be employed.[19] However, in the normal course of dealing, LEC A is never liable for access charges. The Commission reinforced this principle in the *AT&T Declaratory Ruling* when it noted that:

> pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and *not against any intermediate LECs* that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.[20]

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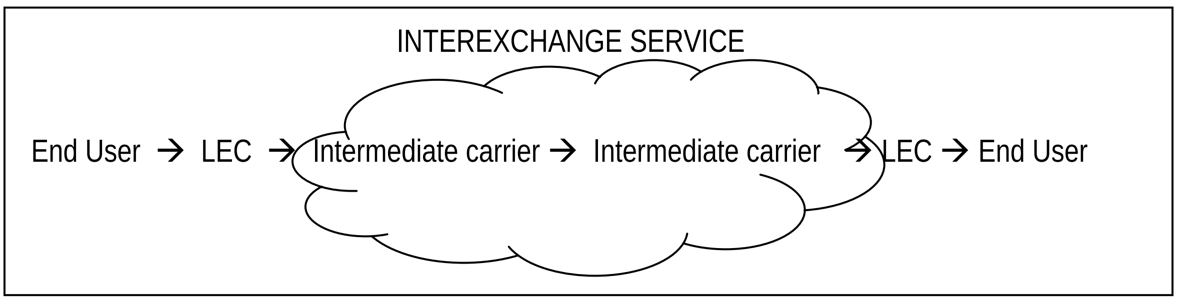
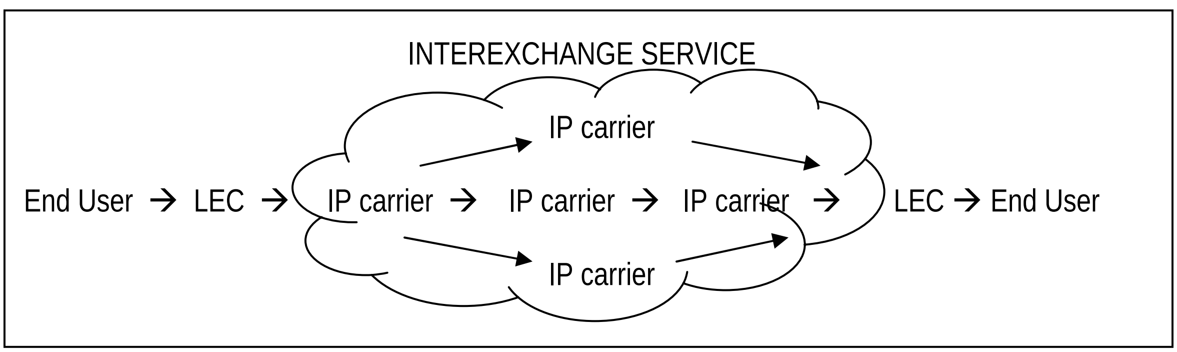
[17] *See, e.g.* SBC 13-STATE Agreement, Attachment Intercarrier Compensation, § 11, available at https://clec.sbc.com/clec/shell.cfm?section=115 (last viewed Nov. 8, 2005).
[18] *See, e.g. id.* § 14.2.1.
[19] *See, e.g.* SBC 13-STATE Agreement, General Terms and Conditions, § 12, available at https://clec.sbc.com/clec/shell.cfm?section=115 (last viewed Nov. 8, 2005).
[20] *AT&T Declaratory Ruling* n.92 (emphasis supplied).

To the extent that SBC asserts that it may declare LEC A to be an IXC, or otherwise impose access charges on LEC A, SBC is ignoring its interconnection agreements, industry guidelines and the Commission's rules.

D. Intermediate Carriers

The situation is slightly more complicated when more than one carrier cooperates to provide the transport service, rather than the local access service. Note that, as in the preceding arrangements, the transport service can be either circuit or packet switched (or both):





These diagrams correspond to SBC's Illustrations 3 and 4, respectively. An originating IXC typically uses intermediate carriers because it does not have end-to-end facilities necessary to route a particular call from the originating to terminating LEC. Intermediate carriers may also be used for the purposes of least cost routing of transport, but not for the nefarious purposes that

SBC ascribes to the practice.[21] Level 3 agrees with SBC that if the call should have been delivered using an access service, it makes no difference whether the party delivering the call holds itself out to be an IXC. If a competent authority determines that the end-to-end service is interexchange telecommunications subject to access charges, the last party delivering the call to the local exchange access provider(s) is the only party responsible for access charges. This principle holds regardless of the method in which this party interconnects to the local exchange.

A pertinent example concerns ESPs that subscribe to local exchange business services, typically primary rate interface ("PRI") trunks. To the extent that they are truly offering an enhanced service, the Commission regards them as end users and finds this permissible.[22] On the other hand, actual access traffic, including IP-in-the-middle, should be exchanged with the local PSTN via one of the access services offered for this purpose, specifically a switched access feature group service or local interconnection trunks if agreed to by the interconnecting parties or as decided in an arbitration pursuant to the Telecommunications Act of 1996. Level 3 suggests that the Commission could better address SBC's request for relief by (1) clarifying that there is no situation in which local exchange business services may be used for the delivery of PSTN-to-PSTN long distance traffic and (2) permitting LECs to amend their access tariffs to include

[21] As a general matter, the FCC has endorsed the use of "least-cost routing" ("LCR"); *e.g.*, the practice of routing an interstate telecommunications call through different carriers for delivery to the ILEC. *See Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd 1131 (2002) (dismissing Graphnet's claim that AT&T unlawfully routed traffic through other carriers to avoid high termination fees had it routed directly to Graphnet); *see also Fonorola Corporation Application for Authority Under Section 214 of the Communications Act to Resell Facilities of Other Common Carriers to Provide Domestic Carriers Interconnection with Canadian Carriers*, 9 FCC Rcd. 4066 (1994) (discussing international least-cost routing with specific emphasis on Canada). These FCC decisions concerning LCR have never contemplated shifting access charge responsibilities or other obligations or liabilities onto another carrier.

[22] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2633, para. 17 (1988).

provisions reclassifying fraudulent local exchange business service customers as access customers.

At the same time that it provides this further protection, however, the Commission should also emphasize that terminating LEC(s) can *not* sift through the chain of carriers and pick who is responsible for access charges. Level 3 agrees with VarTec that LECs cannot impose liability on carriers who have not subscribed to the LEC's access services. In its Petition, VarTec argues that a carrier that has not subscribed to a LEC's access services in accordance with the ordering terms of the LEC access tariff is not a customer of the LEC and has no liability for access charges (or other intercarrier compensation), even if the terminating traffic transited that carrier's network at some instant.[23] Instead, the last non-LEC delivering IXC traffic is the access customer, and the access provider must seek compensation from that party.

In contrast, SBC appears to be asserting that both the last party delivering traffic to the terminating LEC(s) *and* the intermediate carrier are liable for SBC's access charges. While SBC does not argue in its Petition for such joint/vicarious liability, it did so in the Amended Complaint that is attached to the Petition.[24] Although VarTec was not the carrier that delivered traffic to SBC, it was a joint defendant in the Complaint, with SBC asserting that "the fact that VarTec hands off calls to Unipoint, Transcom, or other LCRs, which in turn may hand off traffic to other intermediaries in order to deliver it to plaintiffs for termination, is wholly immaterial to whether VarTec owes access charges on that traffic."[25] SBC based its claim against VarTec on "the same federal and state access tariffs that apply to all other ordinary interexchange voice traffic that interexchange carriers terminate with plaintiffs." However, SBC did not reference

[23] VarTec Petition at 4.
[24] First Amended Complaint, Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc., No. 4:04-CV-1303CEJ (E.D. Mo. filed Dec. 17,2004), SBC Petition Ex. F.
[25] *Id.* at 14-15.

any authority that expressly or implicitly imposed an obligation on VarTec (who does not interconnect directly with SBC or a cooperating LEC that jointly provides terminating access service), to compensate SBC for the traffic that it terminates. As explained below, there is no such authority in SBC's tariff or FCC rules.

1. There Is No Tariff Authority

It is not surprising that SBC omitted this particular element in its allegation, since there is no provision in SBC's relevant tariffs or FCC rules that imposes this obligation on an intermediate carrier. Each of the RBOC's access tariffs contain provisions stating that the RBOC will "bill on a current basis all charges incurred by and credits due to the *customer*."[26] Under the terms of these tariffs, the ILEC bills a "customer." As VarTec notes in its Petition, the term "customer" in these tariffs "denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this tariff, including Interexchange Carriers (ICs) and End Users."[27]

The Commission's access charge rules permit ILECs to charge IXCs for the use of the ILEC's facilities. Part 69 of the rules "establishes rules for access charges for interstate or foreign access services"[28] and provides that "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that *use* local exchange switching facilities for the provision of interstate or foreign telecommunications services.[29] The Commission has established similar rules for non-ILECs.[30] However, these rules apply only to those carriers that

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[26] *See supra* note 8.
[27] *See supra* note 9.
[28] 47 C.F.R. § 69.1(a)
[29] 47 C.F.R. § 69.5(b)(emphasis added).
[30] *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 9923 paras. 40-44 (2001).

directly utilize the ILECs' network facilities to originate and terminate traffic to LECs.

The rules do not impose any duty on a carrier that hands traffic off to another carrier for interexchange routing. "Access services" are defined as "services and facilities provided for the *origination* or *termination* of any interstate or foreign telecommunication."[31] Intermediate steps by which telecommunications may be routed after leaving the "origination" point, and before arriving at the "termination" point, are not governed by the access charge rules. Access charges are only imposed on the IXC that accepts originating interstate telecommunications traffic from a LEC or that exchanges interstate telecommunications traffic with the terminating LEC ("the delivering IXC"). As such, Commission rules do not permit SBC to seek access charges from intermediate IXCs such as VarTec.

2. Intermediate Carrier Liability Would Be Against Public Policy

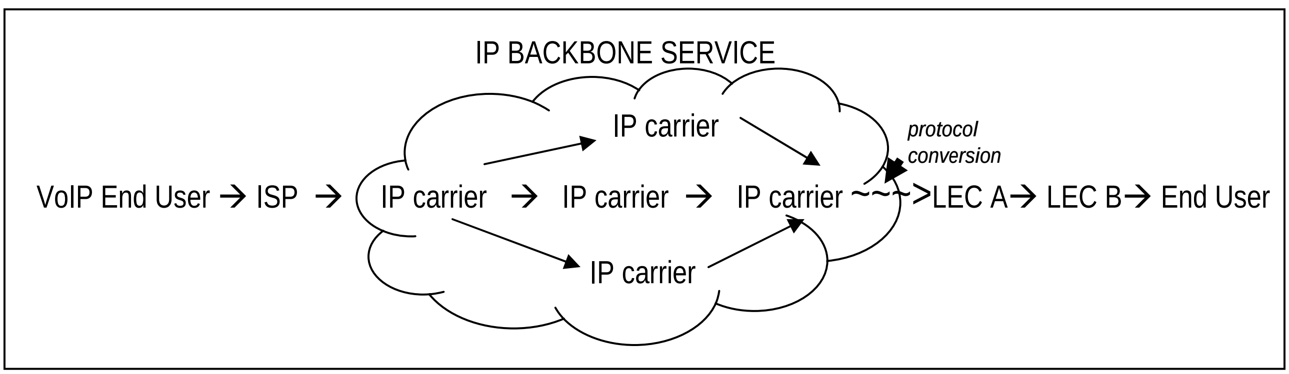
If the Commission were nevertheless to find that intermediate carriers could be liable for access charges, it would have a devastating affect on the development of IP-enabled services, especially VoIP, which rely on ad hoc peering and adaptive routing techniques. Unlike circuit-switched networks, IP networks do not rely on a fixed route for a single transaction. IP networks use a connectionless "adaptive" routing system, which means that a dedicated end-to-end channel need not be established for each communication.[32] IP networks convert all forms of information into indistinguishable data packets ("datagrams") that are routed dynamically between multiple points based on the most efficient route at any given moment.[33] Indeed, in an IP environment, the physical network "layer" does not distinguish between types of applications, and applications can be developed without changing the underlying transport mechanism. This

[31] 47 C.F.R. § 69.2(b) (emphasis added).
[32] William Stallings, Data and Computer Communications 585 – 591 (7th ed. 2003).
[33] *Id.* at 325 – 327.

means that even in a PSTN-to-PSTN, IP-in-the-middle application, the call may not traverse a predetermined route, may transit multiple intermediate carriers, and, thanks to seamless peering relationships, may even use *different combinations* of intermediate carriers during the same call. The advantages of this system would be seriously undermined by SBC's proposal. Among other problems, imposing access liability on intermediate IP carriers could disrupt peering relationships as IP backbone providers would be forced to take steps to protect themselves from this potentially broad and duplicative access charge liability.

III. ONLY PSTN-TO-PSTN LONG DISTANCE COMMUNICATIONS ARE IMPLICATED BY THIS PROCEEDING

Finally, the Commission should make clear that, regardless of the outcome of this proceeding, it applies only to situations where the long distance traffic originates as PSTN traffic and terminates as PSTN traffic, *i.e.* there is no protocol conversion. For example, it would not apply to the following arrangement:[34]



In this situation, a VoIP user connects directly to a broadband ISP, and the call travels an IP network before undergoing a protocol conversion and terminating to a PSTN end user. To

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[34] The protocol conversion could be performed either by the IP carrier or the LEC providing terminating gateway service to the IP carrier.

date, with the exception of jurisdictional determinations,[35] the Commission has made no definitive regulatory determinations regarding VoIP services pending development of a record on the broad policy issues involved.[36] To the extent that the Commission feels the need to revisit this conclusion, this proceeding is not the place to do it. Instead, it should be addressed in the IP-Enabled or Intercarrier Compensation proceedings.

IV. CONCLUSION

It is appropriate for the Commission to take this opportunity to clarify the rules regarding compensation for some types of IXC traffic. In particular, Level 3 believes that the Commission should emphasize that PSTN-to-PSTN long distance traffic is subject to access charges, regardless of how it is carried, and that it must be terminated via LEC(s) access service offered for that purpose. By doing so, the FCC will bring clarity to an important part of the intercarrier compensation regime. On the other hand, this proceeding is not the place for the Commission to address any IP-enabled traffic that does not both originate and terminate on the PSTN.

In addition, the Commission should dictate that LECs cannot unilaterally resolve any questions regarding proper application of access charges simply by seeking judgments against all parties in the chain of traffic. For instance, the Commission should reiterate that, absent contractual arrangements to the contrary, one LEC may not impose access charges on another LEC who jointly provides access service for the termination of such PSTN-to-PSTN long distance traffic. Nor may a LEC ignore its tariff and seek out an intermediate carrier with "deep pockets" capable of paying access charges. Rules currently exist for resolving these issues, and

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[35] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004).
[36] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 para. 90 (1998) ("*Report to Congress*").

to the extent that there continue to be ambiguities, the Commission is in the process of refining these rules. Concerned LECs should use these forums to advocate adoption of their positions.

Respectfully submitted,

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